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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL SHEA, Defendant and Appellant.	B286508 (Los Angeles County Super. Ct. No. ZM023625)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed.

Christopher L. Haberman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David Madeo and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Shea appeals from a jury verdict adjudicating him a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.),[1] and ordering his commitment for an indeterminate term to the custody of the Department of State Hospitals (DSH). Appellant contends that the trial court erred in admitting hearsay evidence in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and in excluding evidence of scientific studies he proffered. Appellant further challenges the jury instructions and contends the evidence is insufficient to support the finding that he was an SVP. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Department of Corrections and Rehabilitation referred appellant to DSH for an evaluation. On May 14, 2014, DSH recommended to the Los Angeles County District Attorney that a civil commitment petition be filed. On May 30, 2014, respondent filed a petition under section 6601 to commit appellant as an SVP.

"An SVP is 'a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a)(1).) Under the SVPA, the People may seek to confine and treat SVPs 'until their dangerous disorders recede and they no longer pose a societal threat.' [Citation.]" (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 383 (*Burroughs*).) The jury found true the allegation that appellant is an

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[1] Unspecified statutory references will be to the Welfare and Institutions Code.

SVP, and the court ordered appellant committed to the custody of DSH for an indeterminate term.

The following evidence was presented at trial.

The People's Evidence

I. *Predicate Offenses*

A. *March 1984 Elizabeth J.*

On March 13, 1984, Elizabeth J., a 23-year-old student from Wisconsin, was visiting her cousin in Los Angeles. She and her cousin went out for drinks at a bar. Appellant, who was 22 years old at the time, was at the bar and flirted with them.

As the bar was closing, a man identified as "Sean" invited Elizabeth and her cousin to a party at his apartment. Appellant asked if he could come, and he was invited. Elizabeth rode in appellant's car, and her cousin rode with Sean. When they arrived at Sean's apartment, Sean and Elizabeth's cousin went inside.

Appellant parked the car, leaned over and kissed Elizabeth, put his hand up her skirt, and touched her vagina with his thumb. Elizabeth pushed his hand away and said "no." Appellant said he wanted to make love to her, and she said "no." Appellant said, "Let's go for a drive," and she again said "no."

Elizabeth grabbed the car keys from the ignition, and a struggle ensued. Appellant punched Elizabeth in the eye and retrieved the keys. Elizabeth opened the car door and tried to get out, but appellant pulled her back in, so that she was lying on her back with her legs hanging out of the car. Appellant drove away, yelling at her to close the door, but she refused because she wanted to be seen.

Appellant stopped the car and began struggling with Elizabeth, ripping off her pantyhose and removing her shoes. Elizabeth tried to convince him to stop, but appellant removed her underwear and inserted his fingers in her vagina. Elizabeth told appellant she was having her period, but appellant said he did not care, pulled out her tampon, and unzipped his pants.

Elizabeth kicked appellant in the groin. Appellant threw Elizabeth into the car door, and her head struck the door handle. Appellant placed his hands around her neck and choked her. As Elizabeth's vision became blurry, she felt appellant remove his hand from her neck and insert his penis in her vagina.

After the rape, appellant left the car, and Elizabeth was able to run away and ask for help at a nearby apartment. Elizabeth reported the rape when she returned to Wisconsin a few days later. The attack left Elizabeth with a black eye, marks on her neck, scratches and bruises on her legs, and difficulty swallowing.

Appellant pled guilty to one count of kidnapping (Pen. Code, § 207) and one count of rape by force or fear (Pen. Code, § 261.2).

B. *October 1984, Michelle R.*

Appellant committed another rape while he was out on bail. On October 27, 1984, appellant met Michelle R. while they were drinking at a club in Pasadena. They were both intoxicated. Michelle did not know appellant, but she asked him for a ride home because she had drunk too much and did not feel well.

Michelle remembered getting into appellant's car. Appellant started pulling down her pants and fondling her. Michelle struggled, and appellant struck her several times in the face and head and choked her until she was

unconscious. Someone discovered her later, lying in an alley behind a trash bin.

Michelle had a deep laceration on her face and bruised eyes. She was bleeding from her nose, mouth, and head, and her clothes were torn and bloody. She had severe damage to her larynx, required 30 stitches to close the laceration on her face, and was told she would need plastic surgery on her face.

Appellant pled guilty to attempted murder (Pen. Code, §§ 664/187) and assault with intent to commit rape (Pen. Code, § 220). The case was consolidated with the case involving Elizabeth, and appellant was sentenced to 14 years in prison for the two cases.

C. *July 1993, Victoria V.*

On July 19, 1993, while on parole for the first two cases, appellant committed another sex offense. A few days prior to the offense, appellant met Victoria V., a 32-year-old unemployed nurse. Appellant helped her obtain a job interview at a hospital.

On the night of the offense, appellant and Victoria went to a few bars and then went to appellant's apartment. Appellant grabbed Victoria by the hair, unzipped her dress, threw her on the bed, and raped her repeatedly vaginally and anally. Appellant was telling Victoria, "You'll fucking like it!" Appellant grabbed a statue and inserted it in Victoria's vagina or anus and hit her on the head with it. Appellant also inserted a plum pit in her vagina.

When appellant went to the bathroom, Victoria grabbed her clothes and ran to a nearby residence. A witness told police Victoria was nude and hysterical, and she said she had been raped. Victoria was taken to the

hospital. She had bruising on her face, head, and body, and scratches on her inner body.

Appellant was convicted by jury of forceful rape (Pen. Code, § 261, subd. (a)(2)), sodomy by means of force (Pen. Code, § 286, subd. (c)), and forceful oral copulation (Pen. Code, § 288, subds. (a), (c)). He was sentenced to 35 years in state prison.

II. *Disciplinary History*

A. *Prison*

While in prison, appellant committed the following CDC-115 Serious Rule Violations (115s): December 5, 1986 Threatening staff; June 14, 1987 Reporting late to work; December 3, 1987 Theft of state food; December 9, 1987 Conduct; March 16, 1988 Picture contraband; July 12, 1988 Contraband–serious security breach; November 24, 1988 Possession of marijuana; January 25, 1989 Failure to report; November 16, 1990 Conspiracy to traffic narcotics; January 20, 1996 Manufacturing alcohol; February 22, 1996 Manufacturing alcohol; February 28, 1996 Possession of marijuana; June 8, 1997 Battery on peace officer resulting in serious injury; June 18, 1997 Battery on inmate; June 30, 1997 Flooding the tier; July 17, 1997 Resisting staff; November 12, 1997 Conspiracy to circumvent mail; October 18, 1999 Willfully delaying a peace officer; September 8, 1999 Possession of dangerous contraband; January 2, 2011 Fighting; August 12, 2013 Under the influence.

B. *State Hospital*

Appellant's records from Coalinga State Hospital were reviewed, and his disciplinary record was admitted into evidence. On February 5, 2016,

appellant was found in possession of "pruno," an inmate-brewed alcoholic beverage.

In approximately April 2017, hospital staff noticed appellant behaving strangely and thought he might be in an amphetamine-induced psychosis. Appellant initially refused a drug test but eventually performed a test, which showed amphetamine use. He admitted he had been using the drug for about a month.

III. *Testimony of State Evaluators*

A. *Dr. Bruce Yanofsky*

Dr. Yanofsky, a clinical forensic neuropsychologist who contracted with DSH to perform SVP evaluations, had performed about 650 evaluations since he began in 2003. After a change in the law in 2006, the percentage of evaluations Dr. Yanofsky found to meet the SVP criteria dropped from 39 percent to 12 to 13 percent. In conducting the evaluations, Dr. Yanofsky typically examined court documents, charging documents, police reports, parole officer reports, and a central file and mental health records from the Department of Corrections and Rehabilitation.

Dr. Yanofsky evaluated appellant in April 2014 and June 2017 and found both times that appellant met the SVP criteria. In addition to interviewing appellant, Dr. Yanofsky reviewed appellant's criminal history, relying on a California Law Enforcement Telecommunication System (CLETS) printout.

Dr. Yanofsky opined that appellant's sex crimes were predatory because they were committed against a stranger (Elizabeth and Michelle) or against someone with whom he established a relationship for the sole purpose of victimization (Victoria). (See § 6600, subd. (e) ["'Predatory' means

an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization"].) They also involved the use of force and violence.

Appellant admitted that the description of the incident with Elizabeth, as set forth above, was accurate. He stated that he was intoxicated and on drugs at the time, but he did not want to use that as an excuse. Appellant also admitted to the facts of the incident with Michelle, stating, "The same dumb thing happened as happened with Elizabeth." He stated that he was not "accustomed to having women or anyone for that matter saying no to him," that he was "a 'spoiled brat,' and that he would take what he would want anyway."

Dr. Yanofsky diagnosed appellant as having an unspecified paraphilic disorder, antisocial personality disorder, and substance use disorders. He testified that paraphilia is a sexual deviancy disorder, and a paraphilia that causes distress to the person or harm to others is a paraphilic disorder. There are a number of specific paraphilic disorders, but not all sexual deviancy disorders are specifically classified because human behavior is too diverse.

There are two categories for paraphilias not specifically delineated in the Diagnostic and Statistical Manual (DSM): other specified paraphilic disorder and unspecified paraphilic disorder. Other specified paraphilic disorder is when someone is sexually attracted to an object such as a chair.

Unspecified paraphilic disorder is when the clinician does not understand what the person is sexually attracted to, or the person has shown interest in various things, all deviant. The person further must have a sexual interest manifested in behaviors, urges, thoughts or fantasies lasting

at least six months, aimed at something not normal to be attracted to, and that has resulted in harm or distress.

Dr. Yanofsky explained that there was a dispute in the scientific and nonscientific community whether rape should be categorized as a mental health disorder, such as rape paraphilia or coercive paraphilic disorder. The issue was controversial because of the political concern of giving rapists a "mental health excuse" for their crime.

Dr. Yanofsky found elements of sexual sadism in the way appellant assaulted and hurt his victims and used excessive force, such as punching and choking. Dr. Yanofsky further stated that appellant had an extensive history, having committed two rapes in a few months, then spending seven years in prison, and only seven months after his release, committing a similar rape—this indicated the behavior lasted longer than six months. He thus decided on the unspecified paraphilic disorder diagnosis, explaining that appellant had a deviant connection between aggression and sex that he was unable to stop over the course of several years. He believed that the disorder had not faded with time because it was generally understood that paraphilic disorder is characterized by long-term, chronic conditions that are fixed for life.

The fact that appellant had not committed rape since his imprisonment in 1993 was not relevant to Dr. Yanofsky's diagnosis because of the lack of opportunity, sometimes referred to as "institutional remission." The likelihood of appellant finding a new victim and committing another offense if placed back in the community was very great.

Dr. Yanofsky testified that appellant's use of alcohol and amphetamine while in Coalinga State Hospital indicated an inability to learn from mistakes, experience appropriate guilt, and abide by rules, supporting the

diagnosis of antisocial personality disorder. Appellant was intoxicated in two of the three rapes and acknowledged that alcohol played a part in his conduct. The disinhibiting effects of alcohol and drugs affected the paraphilic disorder by impairing his judgment and lowering his ability to control his behavior.

Characteristics of antisocial personality disorder include violating rules from an early age, the inability to learn from mistakes, and hurting others. Appellant's early behavioral problems, juvenile criminal history, and commission of the three rapes despite having been in custody supported the diagnosis of antisocial personality disorder.

When Dr. Yanofsky interviewed appellant, appellant insisted that the offense against Victoria was consensual sex and did not believe he had any mental health or sexual problem. His antisocial personality disorder enhanced the paraphilia because he did not feel guilty for harming other people and violating societal norms. Although people with the disorder become less violent or less aggressive as they age, their general disposition and perception of the world does not change. The nature of the disorder does not lend itself well to treatment because people with the disorder do not feel they have a problem. Appellant had enrolled in but dropped out of a sex offender treatment program at Coalinga.

Dr. Yanofsky used actuarial tools to determine appellant's likelihood to reoffend in a sexually violent manner. The first tool, the Static-99R, examined ten static, or unchanging factors to assess the likelihood of recidivism for a new sexual crime. Appellant's score of 7 placed him at a risk level of well above average. The second test, the Static-2002R, was a similar but updated version of the first. Appellant's score placed him in the risk category of above average.

Dr. Yanofsky also considered dynamic risk factors, which can change with treatment or intervention. He concluded that appellant presented high risk based on his behavior in custody.

Dr. Yanofsky used the Psychopathy Checklist Revised, or PCL-R, to assess appellant's level of psychopathy, which is related to a higher level of sexually violent crimes. Appellant's score of 30 was high, but a score of 35 is the threshold for labeling someone a psychopath. His high score, coupled with his antisocial personality disorder, paraphilic disorder, and general history indicated that appellant would be difficult to manage in the community and at risk of committing another violent sexual offense. Dr. Yanofsky concluded that appellant presented a serious, well-founded risk of committing a violent, predatory offense and should not be released into the community without treatment and supervision.

B. *Dr. Tracy Dern*

Dr. Tracy Dern, a clinical psychologist, had performed about 75 SVP evaluations and found 8 percent of those evaluated to meet the SVP criteria. She evaluated appellant in 2014 and 2017. In conducting her evaluations, she interviewed appellant and reviewed records from the prison and state hospital, including police reports, abstracts of judgment, and probation officer reports.

Dr. Dern found several factors relevant to her analysis in the crime against Elizabeth. The crime involved excessive violence (she was choked and punched in the face) and severe humiliation (her tampon was ripped out). After the rape, appellant appeared to believe nothing significant had occurred because he did not mind Elizabeth telling him she wanted to return to her cousin at the party. Because appellant had just met Elizabeth, Dr. Dern

concluded the offense was predatory in nature. When Dr. Dern interviewed appellant in 2014 and 2017, he denied raping Elizabeth, claiming that he had only touched her vagina and driven erratically.

Dr. Dern also concluded that the crime against Michelle involved excessive violence, noting that the victim had severe damage to her larynx and required 30 stitches to the cut on her forehead and was told she would require plastic surgery to repair the damage to her face. The violence was escalating because this victim required immediate medical attention. Dr. Dern found it significant that the attack on Michelle occurred only one month after appellant's arraignment for the attack on Elizabeth.

As to the crime against Victoria, the factors that Dr. Dern considered significant to her analysis were that the victim was a stranger, the rape occurred while appellant was still on parole, alcohol was involved, and there was excessive violence beyond the violence used to commit the rape. The crime also involved humiliation and "enjoyment of the humiliation." Appellant told Dr. Dern that the sex was consensual, that the police were setting him up, and that the victim was trying to obtain money from him.

Dr. Dern diagnosed appellant with the following: other specified nonconsent or paraphilic coercive disorder, antisocial personality disorder, and substance abuse disorders. Paraphilic coercive disorder is sexual arousal by forcing a victim to comply with sex. Dr. Dern testified that this disorder is not highly prevalent and is not specifically listed, but the DSM lists about 582 other paraphilias that are in the category of "other specified." She believed that it was not common for people to commit rape more than once.

Dr. Dern related the following as the basis for her diagnosis of paraphilic coercive disorder. The most important indicator was the pattern of repeatedly committing rapes when he is released from prison. Further, his

victims were strangers, and he used gratuitous violence and humiliation to commit the crimes. Dr. Dern testified that most people with antisocial personality disorder do not commit more than one sex offense, so the fact that appellant committed two more after the initial sex offense supported the diagnosis of a coercive disorder.

Dr. Dern considered and ruled out the diagnosis of sadism, but made the diagnosis of paraphilic coercive disorder. She explained that there was some disagreement about the paraphilic coercive disorder diagnosis because some people believed that paraphilic coercive disorder should be on a continuum, with sadism as the more severe disorder, and paraphilic coercive disorder as the lesser disorder. Some believed that paraphilic coercive disorder did not exist because it was "all sadism," while others prefer the less severe term of paraphilic coercive disorder. Nonetheless, there was no dispute that the focus of the diagnoses was rape and that the disorder existed. The only issue was the label of the diagnosis.

Dr. Dern calculated appellant's likelihood of reoffending using the Static-99. Appellant received a score of 7, which placed him in the high risk category. Dr. Dern also considered 12 dynamic risk factors and found that all but one (child-related risk factors) applied to appellant. She thus concluded that appellant's risk factors indicated he was likely to commit another sex crime.

Defense Evidence

Appellant called three witnesses: Cheryl Shea (appellant's ex-wife), Dr. Brian Abbott and Dr. Allen Frances.

I. *Cheryl Shea*

Shea was married to appellant from 1995 to 2015. They first met in 1993 at a bar in Long Beach and discovered they both lived in the neighborhood. After playing pool and talking at the bar, appellant walked Shea home, kissed her on the cheek, and offered to help her move.

Shea called appellant a few weeks later, and appellant helped her move. Appellant saw Shea arguing with her ex-boyfriend and offered to let her stay with him. Shea lived with appellant for a few months and had a romantic, sexual relationship with him. Appellant never used coercive behavior or asked Shea to act out a rape fantasy. After Shea moved out in May 1993, they occasionally had sex, but they were both dating other people.

After appellant was arrested for the July 1993 offense, Shea began speaking to him on the phone and visiting him in jail, and they married while he was in jail. Shea visited appellant in prison, and they had sex during her three-day visit. They eventually drifted apart, and Shea moved to Tennessee in 2010. After the most recent legal proceedings, Shea began speaking on the phone with appellant three to four times a month.

II. *Dr. Brian Abbott*

Dr. Abbott, a licensed clinical psychologist and licensed clinical social worker, was a sex offender evaluator in the State of Illinois and had been evaluating and treating sex offenders for 39 years. He conducted SVP evaluations in nine states, including California.

After interviewing appellant, conducting tests, and reviewing the record, Dr. Abbott concluded that appellant suffered from antisocial personality disorder, but that the disorder did not predispose him to engage in sexually violent acts. He described antisocial personality disorder as "an

enduring, inflexible pervasive type of problem where a person is prone to violate the basic rights of other people. . . . [¶] [T]he behavior patterns tend to be habitual, meaning that they occur often. They are pervasive, meaning that they occur regularly in multiple situations." Although it could lessen with age, and appellant's had lessened in custody, Dr. Abbott believed that appellant still suffered from the condition. He testified that appellant's disorder did not predispose him to sexually violent offenses because appellant would have engaged in that behavior in custody. He further believed that appellant's substance use in custody stemmed from the antisocial personality disorder, not a substance use disorder.

Dr. Abbott considered but rejected the diagnosis of paraphilic coercive disorder, stating that it is a disputed diagnosis that he believes exists in "very rare cases." He testified that there are not reliable ways to diagnose the disorder.[2]

According to Dr. Abbott, the DSM-5 rejected paraphilic coercive disorder as a diagnosis. There are eight paraphilias listed in the DSM-5, such as pedophilia, voyeurism, exhibitionistic disorder, sadism, and masochism. These are listed because of "general acceptance in the psychiatric/psychological community that [there] are valid diagnostic criteria to describe each of those eight paraphilic conditions."

In addition to the eight listed disorders, there is a category called "other specified paraphilic disorder," which Dr. Abbott stated is not a mental disorder but "a category that allows clinicians to record other paraphilias not listed in the manual." Dr. Abbott stated that there is not a category in the

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[2] The People objected to testimony about studies examining the paraphilic coercive disorder. The court held an Evidence Code section 402 hearing outside the presence of the jury and excluded the studies. This issue is discussed in more detail below.

DSM for rape, but that someone suffering from paraphilic coercive disorder would be recorded as other specified paraphilic disorder, paraphilic coercive disorder.

Dr. Abbott relied on two diagnostic criteria to determine if a rapist has a paraphilia. The first is whether the person's sexual arousal from forcible sex is equal to or greater than his interest in consenting sex. The second is whether the person acts on that arousal or if it impairs his functioning.

As to the offense against Elizabeth, Dr. Abbott believed that appellant telling her he wanted to make love to her indicated he wanted to engage in consensual sex. Appellant's excessive violence indicated his anger over being rejected, and his inebriation resulted in the incapacity to modulate his anger. Dr. Abbott thus believed the rape was inconsistent with a diagnosis of paraphilic coercive disorder but instead was due to the alcohol and the antisocial personality disorder.

Dr. Abbott also believed the offense against Michelle did not show appellant had a preference for nonconsensual, forcible sex. He testified that one cannot rely on the behavior to make a diagnosis because the behavior can come from different psychological problems. Instead, it is more appropriate to understand the person's mental state and then determine which mental disorder fits the clinical behavior. The rape of Michelle was consistent with appellant's antisocial personality disorder and intoxication, not paraphilic coercive disorder.

As to the rape of Victoria, Dr. Abbott noted that before the assault happened, Victoria sat in appellant's lap and kissed him. Appellant became angry after Victoria refused to have sex with him. Dr. Abbott again believed this offense indicated antisocial personality disorder and acute alcohol intoxication, not a preference for forced sexual behavior.

According to Dr. Abbott, the fact that appellant committed two of the offenses while he was out on parole supported the conclusion that he has antisocial personality disorder and shed no light on paraphilic coercive disorder. He explained that "the frequency of the rapes tells us nothing about what motivates the rape."

Dr. Abbott opined that appellant's sexual relationships with Shea and other consenting partners, which did not involve force or coercion, refuted a diagnosis of paraphilic coercive disorder because the disorder involves a preference for coercive behavior. Dr. Abbott distinguished sexual sadism from paraphilic coercive disorder. He stated that, in sexual sadism, "the source of their sexual excitement is the deliberate infliction of psychological or physical suffering on another person who is not consenting to it," whereas the excitement in paraphilic coercive disorder comes from "the fact that the victim is resisting or not consenting to engaging in sexual behavior." Dr. Abbott believed that appellant's use of force and use of foreign objects did not indicate a diagnosis of sexual sadism.

Dr. Abbott has written or co-written six peer reviewed articles and seven non-peer-reviewed articles regarding SVP actuarial risk assessments, such as Static-99 and Static-99R, used to predict the risk of recidivism of SVPs. The articles identify problems with the assessments and suggest solutions to improve their accuracy. Dr. Abbott also conducted research about whether dynamic risk factors accurately predict the risk for sexual recidivism. He opined that the state evaluators did not conduct an accurate assessment of appellant's risk of reoffending.

Dr. Abbott used the Static-99R to assess appellant's risk of reoffending and concluded that appellant was a 6, well above average. Because he believes the Static-99R actuarial table overstates the risk of recidivism

among California sex offenders, Dr. Abbott also considered appellant's age and "unique common sense factors outside the Static-99R." He concluded that appellant is not a serious and well-founded risk to engage in sexually predatory acts because his risk is no more than "a mere possibility," and when appellant reaches the age of 65 in ten years, the risk will be reduced by half, going from 20.5 percent to 10.9 percent.

III. *Dr. Allen Frances*

Dr. Allen Frances, a psychiatrist who specializes in psychiatric diagnosis, was the author of guidebooks on how to conduct a DSM-4 diagnosis and a DSM-5 diagnosis. Dr. Frances testified that the DSM was created to provide a set of criteria to help provide accurate and consistent diagnoses. He worked on the DSM-3 and DSM-4 and was critical of the DSM-5. He explained that, although the DSM creates a common language and criteria for diagnosis, in clinical practice, many patients do not fit the checklists.

Dr. Frances has spoken at workshops and conferences for state evaluators, cautioning them to be more accurate in their use of the DSM. He testified that the DSM was developed for use in treatment and does not translate that well in a courtroom situation. He believed that there is a lot of misdiagnosis and confusion regarding the DSM in SVP cases.

Although rape has been proposed four times as a mental disorder for the DSM, it has been rejected each time and is not a listed mental disorder or paraphilia. Dr. Frances testified that the concept of paraphilic coercive disorder, that is, "a mental disorder called 'non-consent,'" was conceived in 2002 by a state evaluator in Wisconsin.

The eight specific paraphilias listed in the DSM all "have criteria sets that are meant to provide a definition of each of the disorders that would help in increasing the communication amongst the clinicians." Because the DSM is designed for use by clinicians who require a code to be paid for treating patients, the categories of "other" and "unspecified" paraphilic disorders were created to provide a code for doctors to be paid for treating patients who do not fit in one of the eight specific paraphilia categories. These categories are not intended for use in legal proceedings because they are neither accurate nor reliable. Dr. Frances considered it inappropriate to use the category "to sneak in rape through the backdoor" because rape has been rejected as a diagnosis. He also considered it inappropriate for state evaluators to use the "unspecified paraphilia" category because "that means that they made something up out of their head." The diagnosis is "worthless" in a forensic proceeding because the paraphilic coercive disorder was soundly rejected for inclusion in the DSM-5. Dr. Frances believed that the diagnosis of paraphilic coercive disorder might make sense in a clinical setting with a patient who needs "the violence and force of rape in order to get excited," but he had seen this only eight times out of the 70 rape cases he has evaluated.

Dr. Frances opined that, although the rape of Elizabeth was horrible and violent, it was not paraphilic because a person with paraphilic coercive disorder would not have asked her not to fight, as appellant was reported to have done. He stated that punching or choking is routine behavior in rapes because it is the way the rapist subdues his victim.

Similarly, although the attack on Michelle was horribly violent, it did not indicate that appellant suffered from a mental disorder, but that he "is a criminal." Victoria's rape shows appellant as being "an opportunistic, disinhibited bad guy," not a paraphilic rapist.

According to Dr. Frances, rapists are often recidivists, especially when they are young, but that "does not make them mentally disordered," and they tend to "grow out of it." Rapes by men after the age of 50 are very rare. In Dr. Frances's opinion, appellant was not "a mentally ill rapist," but "a very bad guy at that point in his life." Dr. Frances opined that the state evaluations were carelessly done with no explanation as to why the diagnoses are made and could not possibly be accurate. On cross-examination, he acknowledged that he had never worked as a forensic evaluator or been involved in the forensic setting.

DISCUSSION

"An alleged SVP has the right to a jury trial, at which the prosecutor must prove beyond a reasonable doubt that the person was convicted of a qualifying sexually violent offense; has a current, diagnosed mental disorder that makes the person a danger to the health and safety of others; and that the mental disorder makes it likely the defendant will engage in sexually violent criminal behavior in the future. [Citations.]" (*People v. Roa* (2017) 11 Cal.App.5th 428, 443 (*Roa*).)

"Conviction of a qualifying sexually violent offense may support a determination that a person is an SVP, but it cannot be the sole basis for that determination. (§ 6600, subd. (a)(3).) The SVPA mandates that jurors 'be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent behavior.' [Citation.]" (*Roa*, *supra*, 11 Cal.App.5th at p. 444.)

Appellant does not challenge his conviction for a qualifying sexually violent offense. Instead, he challenges the finding of a mental disorder that makes it likely he will engage in sexually violent criminal behavior in the future.

I. *Sanchez Hearsay Testimony Objections*

Appellant contends that the trial court erred in admitting hearsay evidence in violation of *Sanchez*, 63 Cal.4th 665. *Sanchez* held that state hearsay law permits an expert witness to refer generally to hearsay sources of information as a basis for the expert's opinion, but precludes experts from "rely[ing] on case-specific hearsay to support their trial testimony. [Citation.]" (*People v. Williams* (2016) 1 Cal.5th 1166, 1200.)

A. *Background*

On October 2, 2017, appellant filed a motion in limine to exclude the following items as impermissible case-specific hearsay in violation of *Sanchez*: (1) February 4, 2016 note from anonymous source at Coalinga State Hospital that appellant was making and consuming pruno; (2) February 5, 2016 room search revealed appellant manufactured alcohol and non-narcotic drugs; (3) February 12, 2016 complaint from patient that appellant made verbal threats as retaliation for advising staff of appellant's pruno, statement from same patient that appellant was using and under the influence of methamphetamine, all statements by appellant to hospital staff or law enforcement about his involvement with drugs or pruno, and all statements by appellant about his alleged threat to patient; (4) May 1, 2017 positive urinalysis of appellant showing drug use and his statements about drug use; (5) May 4, 2017 statements by nurse practitioner that appellant was

behaving in a bizarre manner and appeared dehydrated and that, as a result of her observations, she requested that he take a urine test; (6) June 9, 2017 statement by fellow patient that appellant demanded some of his property and that appellant's breath smelled of alcohol, and appellant's statements about the incident; and (7) all 115 reports.

The court excluded items (1), (3), and (6) under *Sanchez*, as inadmissible case-specific hearsay statements from another patient to staff. The court denied the motion as to the other items, ruling that appellant's medical and prison records were admissible under the public records exception to the hearsay rule found in Evidence Code section 1280. Appellant's statements to the evaluators were admissible as party admissions under Evidence Code section 1220. The court also ruled that the right to confrontation is not applicable in an SVP hearing, which is a civil matter.

B. *Relevant Law*

Sanchez "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) "Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*Id.* at p. 684.) "'Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.' [Citation.]" (*Burroughs*, *supra*, 6 Cal.App.5th at p. 406.)

"Although *Sanchez* is a criminal case, it also applies to civil cases—such as this one—to the extent it addresses the admissibility of expert testimony

under Evidence Code sections 801 and 802. [Citations.] . . . [¶] Although parties in civil proceedings have a right to confrontation under the due process clause, '[t]he Sixth Amendment and due process confrontation rights are not coextensive. [Citation.] Due process in a civil proceeding "is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings." [Citation.]' [Citation.] In civil proceedings such as this one, ""[d]ue process requires only that the procedure adopted comport with fundamental principles of fairness and decency. The due process clause of the Fourteenth Amendment does not guarantee to the citizen of a state any particular form or method of procedure."' [Citation.]' [Citation.]" (*People v. Bona* (2017) 15 Cal.App.5th 511, 520.)[3]

C. *Analysis*

1. *CLETS Report*

Appellant challenges the admission of his criminal history from his CLETS printout. He cites Dr. Yanofsky's reliance on his CLETS report to argue that the experts erroneously relied on his criminal history to diagnose him with antisocial personality disorder. Dr. Yanofsky testified that appellant's criminal history began in adolescence, which was significant to

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[3] We thus decline appellant's request to hold that the confrontation clause applies here. (See *People v. Otto* (2001) 26 Cal.4th 200, 214 ["There is no right to confrontation under the state and federal confrontation clause in civil proceedings, but such a right does exist under the due process clause"]; *Burroughs*, *supra*, 6 Cal.App.5th at p. 405, fn. 6 [noting that "the state and federal confrontation clauses are not applicable in SVP proceedings"].)

his diagnosis, and that his criminal record indicated that he continued to be involved in criminal activity until he committed his first and second rapes.[4]

"Under *Sanchez*, admission of expert testimony about case-specific facts was error—*unless the documentary evidence the experts relied upon was independently admissible*." (*Burroughs*, *supra*, 6 Cal.App.5th at p. 407, italics added.) "CLETS rap sheets have been found to be admissible under the public records exception to the hearsay rule (Evid. Code, § 1280). . . . *People v. Martinez* (2000) 22 Cal.4th 106, 113, 119 upheld a trial court finding that a CLETS rap sheet satisfied the requirement that, in order to be admissible under the public records exception to the hearsay rule, the entries in the record must have been made at or near the time of event recorded." (*People v. Morris* (2008) 166 Cal.App.4th 363, 367.) In fact, here, the CLETS report was admitted without objection. Appellant thus forfeited any objection to the CLETS report, which, at any rate, was properly admitted.

2. *Probation Reports*

Appellant contends that his probation reports were erroneously relied on "to create [his] psychiatric and personal history and to diagnose substance use disorders and antisocial personality disorder." He points out that probation reports are admissible under section 6600, subdivision (a)(3) to

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[4] Respondent contends that appellant forfeited his challenge to the CLETS report and the probation reports by failing to object in the trial court. Dr. Yanofsky testified that he reviewed the CLETS document and that he also obtained information about appellant's juvenile criminal history from a probation report and from appellant himself. Defense counsel objected to the testimony, stating "foundation and hearsay," but it is unclear which part of Dr. Yanofsky's testimony he was objecting to and if he was objecting specifically to the CLETS report and/or probation report. The objection was overruled.

prove the circumstance of the underlying offense in an SVP hearing, but not admissible to prove the other elements.

Appellant is correct that "[t]he existence of a predicate offense and the details underlying commission of that offense may be established by documentary evidence made admissible by section 6600, subdivision (a)(3). That statute allows admission of 'documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals' *to prove the existence of a prior qualifying offense* as well as the details underlying the commission of the offense. [Citation.]" (*Roa*, *supra*, 11 Cal.App.5th at p. 443, italics added.)

However, even if the probation reports were erroneously considered (and we do not conclude that they were), any alleged error was not prejudicial. This case is unlike *Burroughs*, in which the "probation reports appear to be the only sources in the record that include the details of the uncharged sex offenses that appellant allegedly committed." (*Burroughs*, *supra*, 6 Cal.App.5th at p. 410.)

In *Burroughs*, the erroneously admitted hearsay documents and expert testimony relying on the documents "described, in lurid detail, numerous sex offenses that appellant was not charged with or convicted of committing, including the repeated sodomy of a young boy and the use of a knife handle to penetrate a woman. The experts also testified that appellant was a gang member and described bizarre and even 'lethal' behavior appellant allegedly engaged in while in custody." (*Burroughs*, *supra*, 6 Cal.App.5th at p. 412.) We concluded that "[a]ll of this evidence was exceedingly inflammatory. It depicted appellant as someone with an irrepressible propensity to commit sexual offenses, and invited the jury to punish him for past offenses. It also

substantially enhanced the credibility of the experts' conclusions about appellant's mental state and likelihood of reoffending. In short, the improperly admitted hearsay permeated the entirety of appellant's trial and strengthened crucial aspects of the People's case." (*Ibid.*; see also *Roa*, *supra*, 11 Cal.App.5th at p. 454 [admission of "substantial amount of hearsay" testimony was prejudicial where the hearsay included "the details of sex offenses Roa was not charged with or convicted of committing," such as an arrest for an alleged rape and his alleged sexual abuse of his ex-wife].)

In sharp contrast to *Burroughs*, the probation reports in this case were relied upon only to set forth appellant's juvenile history of substance abuse, his "early behavioral problems," and "a little bit of a juvenile criminal history." Appellant himself reported to Dr. Yanofsky that he had "behavioral difficulties and early involvement with substance abuse," and that he began drinking alcohol in seventh grade and using marijuana when he was 13 or 14 years old. Appellant related similar information to Dr. Dern. Thus, appellant himself admitted early substance abuse and behavioral problems. (See Evid. Code, § 1220 [party admission "not made inadmissible by the hearsay rule"].)

Moreover, appellant's expert, Dr. Abbott, testified that appellant had antisocial personality disorder, which is the diagnosis the probation reports supported. Thus, any alleged error was not prejudicial. (See *Roa*, *supra*, 11 Cal.App.5th at p. 455 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of whether there was a reasonable probability the jury would have returned a more favorable verdict].)

3. *Serious Rule Violations (115s)*

Appellant concedes that his 115s qualify for the public records exception to the hearsay rule. The public records exception is found in Evidence Code section 1280 and provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

The trial court conducted the requisite analysis and found that the 115s were admissible. The 115s and the accompanying declaration were admitted into evidence. Appellant has not demonstrated that this constituted error.

4. *Police Report about Pruno*

During his testimony, Dr. Yanofsky cited a police report that appellant manufactured pruno in the hospital. Appellant contends this is a police report, not a public record for purposes of Evidence Code section 1280, and that police reports are only admissible to prove the underlying facts of the qualifying sex offense.

Although Dr. Yanofsky stated that he had reviewed a police report about the incident, he further testified that appellant admitted in his interview that he manufactured pruno. (See Evid. Code, § 1220 [party admission "not made inadmissible by the hearsay rule"].) Any alleged error in admitting the police report was not prejudicial.

5. *Hospital Report of Methamphetamine*

Appellant challenges testimony by Dr. Dern about a hospital report that appellant was under the influence of methamphetamine. The trial court admitted the hospital reports under the public records hearsay exception in Evidence Code section 1280, finding that they were properly authenticated. The court further found that the probative value of the hospital and prison records was not outweighed by any prejudicial effect for purposes of Evidence Code section 352.[5] Appellant does not explain how the court's admission of the report under the public records exception was error.

II. *Scientific Studies*

Appellant contends the trial court erred in excluding testimony by Dr. Abbott about peer-reviewed research articles critical of the paraphilic coercive disorder diagnosis. We conclude that, even if the court erroneously excluded the evidence, there was no prejudice because appellant presented extensive testimony about the lack of acceptance of the paraphilic coercive disorder diagnosis.

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[5] Appellant briefly contends that the court erred in failing to sustain his objection under Evidence Code section 352. Appellant's statement that the "lurid details" of the pruno and methamphetamine created a "negative impression in the mind of the jury" is not well taken. A report that appellant used alcohol and drugs in the state hospital cannot be described as prejudicially "lurid" or negative, especially in light of the facts of the qualifying offenses.

A. *Background*

Dr. Abbott testified that the paraphilic disorder diagnosis was disputed and unreliable. He began to testify about specific studies from research articles to support his contention, but the People objected.[6] The court held an Evidence Code section 402 hearing.

Defense counsel cited nine studies or reports that Dr. Abbott would testify about. The first found "an unacceptable high probability of clinicians arriving at a false/positive diagnosis for [paraphilic coercive] disorder." Several reported "poor agreement rates" among SVP evaluators in diagnosing paraphilic coercive disorder. Several others stated that "paraphilic coercive disorder is a controversial diagnosis with little consensus as to its diagnostic criteria." Finally, one concluded that "the condition is not a categorical diagnosis as the DSM conceptualized mental disorders, but rather appear[s] to be a dimensional construct. At this point the research has yet to identify the core dimensional constructs constituting a paraphilic coercive disorder, in other words, reliable and valid criteria lacked to diagnose the condition." The court expressed concern that if the expert testified about studies he had not conducted, there would be no way to cross-examine on the studies.

The trial court reasoned that the studies constituted hearsay because they were being offered for their truth, and they related case-specific facts in violation of *Sanchez*. The court acknowledged that the experts could testify that they relied on studies, but ruled that Dr. Abbott could not discuss studies he had not performed himself.

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[6] Prior to trial, the People filed a motion in limine to exclude testimony by Dr. Abbott and Dr. Frances regarding studies and conclusions of other experts.

B. *Analysis*

The trial court reasoned that testimony about the studies discussing the unreliability of the paraphilic coercive disorder would constitute case specific facts in violation of *Sanchez*. However, "[c]ase-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) The studies appellant sought to introduce did not relate to appellant, but instead conveyed general views about the alleged unreliability of the paraphilic coercive disorder diagnosis.

Respondent relies on two pre-*Sanchez* cases to argue that the trial court correctly excluded Dr. Abbott's testimony about other studies. Respondent first relies on *People v. Campos* (1995) 32 Cal.App.4th 304 (*Campos*), but that case is inapposite. There, the psychiatrist who was testifying as an expert in a mentally disordered offender case relied on medical evaluations of the appellant that were prepared by other, nontestifying experts. This testimony clearly violated the hearsay rule (*id.* at p. 308) and would violate *Sanchez*, as it allowed the expert to present facts related to the particular person involved in the case being tried.

The other case cited by respondent, *People v. Landau* (2016) 246 Cal.App.4th 850, cited *Campos* to support its conclusion that the expert erroneously testified to the content of a study he did not conduct. (*Id.* at p. 875.) Unlike *Campos*, the expert in *Landau* was not relying on evaluations of the individual at issue, but rather on a general study about the correlation between testosterone and recidivism risk in sex offenders. Nonetheless, *Landau* stated that the expert "could not testify to the opinions of other experts," citing *Campos*. (*Ibid.*) *Landau* does not support respondent's

contention that the studies on which Dr. Abbott relied, which were unrelated to appellant's case, violated *Sanchez*.

The excluded studies did not relate to the particular events or individuals involved in appellant's case, but instead appeared to be part of the general body of knowledge contributing to Dr. Abbott's expertise, which is allowed under Evidence Code section 802. (See *Sanchez*, *supra*, 63 Cal.4th at p. 676 ["[A]n expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds"].) Nonetheless, we conclude that the exclusion of the studies was not prejudicial because of the extensive testimony appellant presented about the alleged unreliability of the paraphilic coercive disorder diagnosis.

The excluded evidence consisted of studies concluding that the diagnosis of paraphilic coercive disorder was controversial, unreliable, and was often disagreed upon among SVP evaluators. Dr. Abbott testified that there is controversy over whether the diagnosis exists and that there are not reliable ways to make the diagnosis. He further testified that the DSM rejected paraphilic coercive disorder as a diagnosis and that, unlike the listed paraphilias, paraphilic coercive disorder is not actually a mental disorder. Dr. Abbott explained why he believed that each of the three rapes did not indicate appellant had a preference for forcible, nonconsensual sex, but instead indicated antisocial personality disorder and intoxication. He also testified that appellant's sexual relationships with consenting partners refuted a diagnosis of paraphilic coercive disorder. Finally, Dr. Abbott testified extensively about his own articles critical of the risk assessment tools relied upon by the state evaluators.

In addition, Dr. Frances, who testified about his involvement working on the DSM and his work speaking at conferences for state evaluators,

testified at length about the misdiagnosis and confusion regarding the use of the DSM in SVP cases, the rejection of paraphilic coercive disorder by the DSM, and the "worthless" nature of the paraphilic coercive disorder diagnosis. He also testified about why he believed that the three rapes did not indicate paraphilic coercive disorder and that the state evaluations were careless and incompetent.

Appellant thus presented extensive testimony about his theory that the paraphilic coercive disorder diagnosis is unreliable. Moreover, we note that Dr. Abbott acknowledged that he does believe that paraphilic coercive disorder is a diagnosis. He simply did not believe appellant had a paraphilic disorder. We further note that Dr. Frances acknowledged that he had never worked as a forensic evaluator or been involved in the forensic setting. And, both state evaluators acknowledged that there was some disagreement about the paraphilic coercive disorder. Given this testimony, we conclude that it is not reasonably probable the jury would have returned a verdict more favorable to appellant had the excluded testimony been admitted. (See *Roa*, *supra*, 11 Cal.App.5th at p. 455.)

III. *CALCRIM No. 3454*

Appellant contends the trial court erred in refusing his request for a pinpoint instruction. He further contends that CALCRIM No. 3454's definition of "diagnosed mental disorder" was impermissibly ambiguous. We conclude that the trial court correctly instructed the jury.

A. *Background*

The court instructed the jury with CALCRIM No. 3454, which provides that, to prove the allegation that appellant is an SVP, "the People must prove

beyond a reasonable doubt that: [¶] 1. He has been convicted of committing sexually violent offenses against one or more victims; [¶] 2. He has a diagnosed mental disorder; [AND] [¶] 3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior; [¶] The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others."

Prior to trial, appellant filed a motion asking to modify CALCRIM No. 3454 to add the following language: "This is to say the diagnosed mental disorder must be current and must result in volitional impairment that makes Mr. Shea dangerous beyond his control, *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1162 or that Mr. Shea's current capacity or ability to control sexually violent and predatory behavior is seriously and dangerously impaired. *People v. Williams* (2003) 31 Cal.4th 757, 776-777. *See Also* Bench notes to CALCRIM 3454. The People must also prove that there is a recent objective indicia [*sic*] of Mr. Shea's mental condition that predisposes him to sexually violent and predatory criminal behavior. *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161. . . . [¶] This requires the People to prove that there is a recent objective basis for a finding that Mr. Shea is likely to reoffend. *Buffington* 74 Cal.App.4th at 1161."

The court held a hearing on appellant's motion and denied the request.

B. *Analysis*

"'We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of

the adequacy of instructions is based on whether the trial court "fully and fairly instructed on the applicable law." [Citation.] "'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" [Citation.] "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." [Citation.]' [Citation.]" (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287.)

We initially note that appellant concedes that CALCRIM No. 3454 tracks the language of the SVP statute. Generally, the statutory language is "'an appropriate and desirable basis for an instruction.'" (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) However, appellant argues that his requested instruction correctly stated the requirement of a current volitional impairment that makes it seriously difficult for the individual to control his behavior, relying on *Kansas v. Crane* (2009) 534 U.S. 407.

Our state supreme court has rejected appellant's argument. In *People v. Williams, supra,* 31 Cal.4th 757 (*Williams*), the court held that the jury in an SVP hearing need not be "separately and specifically instructed on the need to find serious difficulty in controlling behavior" because the language of the SVPA "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Id.* at p. 759.) Contrary to appellant's argument, *Williams* reasoned that "a judicially imposed requirement of special instructions *augmenting* the clear language of the SVPA would contravene the premise of both [*Kansas v.*] *Hendricks* [(1997)] 521 U.S. 346, and *Kansas v. Crane*, *supra*, 534 U.S. 407, that, in this nuanced area, the

Legislature is the primary arbiter of how the necessary mental-disorder component of its civil commitment scheme shall be defined and described. [Citation.]" (*Id.* at p. 774.) The court thus concluded that *Kansas v. Crane* "does not compel us to hold that further lack-of-control instructions or findings are necessary to support a commitment under the SVPA." (*Id.* at pp. 774-775.)

In light of *Williams*, we also reject appellant's argument that CALCRIM No. 3454's use of the word "includes" in its definition of "diagnosed mental disorder" was impermissibly ambiguous. Appellant makes no argument that would compel us to find that the jury instruction, which tracks the statutory language and has been approved by our supreme court, is impermissibly ambiguous.

"""""Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."""" [Citations.] Consequently, '[i]n reviewing a claim of instructional error, the ultimate question is whether "there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner."' [Citation.]" (*People v. Gana* (2015) 236 Cal.App.4th 598, 608.) There was no such likelihood here.

IV. *Sufficiency of the Evidence*

Appellant contends the evidence is insufficient to support the SVP finding. We disagree.

In considering the sufficiency of the evidence to support an SVP finding, "this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.]" (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) "We 'must presume in support of the judgment the existence of

every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Poulsom* (2013) 213 Cal.App.4th 501, 518 (*Poulsom*).)

The SVPA requires proof beyond a reasonable doubt that the person "has been convicted of a sexually violent offense against one or more victims and . . . has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) "'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).) The jury's finding that appellant meets the statutory criteria is supported by substantial evidence.

Appellant does not dispute the finding of a qualifying offense. As to the other criteria, the state evaluators testified that appellant suffered not only from a paraphilic disorder, but also from antisocial personality disorder, which is characterized by a pattern of disregard and violation of the rights of others, an inability to learn from mistakes, and a lack of remorse. They both assessed appellant's likelihood of recidivism for a new sexual crime as above average or well above average, based on several different assessments. Although appellant's experts testified that the state evaluators' diagnoses and risk assessments were inaccurate and unreliable, "'[t]he credibility of the experts and their conclusions [are] matters [to be] resolved . . . by the jury,' and '[w]e are not free to reweigh or reinterpret [that] evidence.' [Citation.]" (*Poulsom*, *supra*, 213 Cal.App.4th at p. 518.) We will not disturb the jury's finding.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.